# Foong Seong Equipment Sdn Bhd (receivers and managers appointed) v Keris Properties (PK) Sdn Bhd (No 2)

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO A-02-(IM)–876 OF 2008
LOW HOP BING, RAUS SHARIF AND ABU SAMAH JJCA
5 JUNE 2009

*Civil Procedure — Injunction — Interlocutory mandatory injunction — Appeal against — Whether caused hardship and inconvenience to plaintiff and its purchasers — Whether trial judge erred in granting injunction — Whether circumstances justified setting aside*

*Contract — Joint venture — Joint venture agreement — Refusal to execute transfer documents — Whether caused hardship and inconvenience to plaintiff and bona fide purchasers — Whether breach of obligation — Protection by way of interlocutory mandatory injunction — Whether justified*

Pursuant to a joint venture agreement dated 4 May 1996 ('the JVA') the respondent/plaintiff was to develop several pieces of land owned respectively by the appellant/defendant, U-Meng Corporation Sdn Bhd and U-Meng Holdings Sdn Bhd (collectively 'U-Meng'). In this case, the defendant had refused to execute and return the 15 memoranda of transfer to effect the registration of the transfer of titles to the purchasers, as a result of which the purchasers could not obtain loans from their banks or financial institutions. Further, the defendant had also refused to execute new sale and purchase agreements, unless the individual purchasers executed a 'Letter of Acknowledgment' ('LOA'), purportedly to ensure that the purchasers would not hold the receivers and managers liable under any circumstances, although the LOA was not a requirement under the JVA or the statutory sale and purchase agreement prescribed in Schedule G to the Housing Development (Control and Licensing) Act 1966. The plaintiff who was unable to receive the proceeds of the sale pursuant to the JVA, commenced an action in the High Court and obtained the interlocutory mandatory injunction against the defendant, the appointed receivers and managers. The terms of the interlocutory mandatory injunction, inter alia, were as follows: (1) to execute the 15 memoranda of transfer; and (2) to fulfil the defendant's obligations under the JVA and to execute all documents in future sales under the development project. Against the said order, the defendant appealed to this court.

**Held**, dismissing the appeal with costs:

(1) The defendant could not refuse to comply with the provisions of the JVA which the parties had voluntarily entered into and pursuant to which the defendant had received benefits. The defendant was therefore, estopped from repudiating the burden imposed on it (see para 27).

(2) The bona fide purchasers who had signed the sale and purchase agreements must not be made to suffer undue hardship and inconvenience as they had to obtain financing from their banks or financial institutions, and ultimately take vacant possession from the plaintiff (see para 29).

(3) As developer, the plaintiff was required to diligently proceed to complete the development project within the time specified in the sale and purchase agreements, because upon the execution thereof, time effectively started to run against the developer. The defendant's refusal to fulfil the obligations under the JVA had adversely damaged the plaintiff's reputation as a licensed housing developer, which could affect the renewal of the developer's licence or even halt the entire development project (see paras 30–31).

(4) As the defendant's conduct had clearly caused hardship and inconvenience not only to the plaintiff but also the plaintiff's purchasers, the court will intervene and allow an interlocutory injunction even when it is one of a mandatory nature (see para 34).

(5) It was clearly inequitable and unconscionable for the defendant to have enjoyed the benefits under the JVA, and yet refused to comply with the obligations to execute the transfer documents, thereby denying the plaintiff and the plaintiff's purchasers of their corresponding rights and interests which therefore required immediate protection by way of an interlocutory mandatory injunction (see para 35).

**[Bahasa Malaysia summary**

Berikutan dengan satu perjanjian usahasama bertarikh 4 Mei 1996 ('PUS') responden/plaintif memajukan beberapa bidang tanah yang dimiliki oleh perayu/defendan, U-Meng Corporation Sdn Bhd dan U-Meng Holdings Sdn Bhd (secara kolektif 'U-Meng'). Dalam kes ini, defendan enggan menyempurnakan dan memulangkan 15 memorandum pindah milik untuk menguatkuasakan pendaftaran pindah milik kepada pembeli-pembeli, menyebabkan pembeli-pembeli tidak dapat membuat pinjaman daripada bank mereka atau institusi-institusi kewangan. Selanjutnya, defendan juga enggan menyempurnakan perjanjian jual beli yang baru, melainkan pembeli-pembeli individu menyempurnakan 'Letter of Acknowledgment'

('LOA'), yang bertujuan untuk memastikan pembeli-pembeli tidak dapat membuat penerima dan pengurus bertanggungan di dalam sebarang keadaan, walaupun LOA bukannya satu keperluan di bawah PUS atau perjanjian jual beli statutori sepertimana yang dinyatakan dalam Jadual G Akta Pemajuan Perumahan (Kawalan dan Perlesenan) 1966. Plaintif yang tidak dapat menerima hasil jualan berikutan PUS tersebut, memulakan tindakan di Mahkamah Tinggi dan mendapatkan injunksi interlokutori mandatori terhadap defendan, melantik penerima dan pengurus. Terma-terma injunksi interlokutori mandatori, antara lain, adalah seperti berikut: (1) untuk menyempurnakan 15 memorandum pindah milik; dan (2) untuk memenuhi kewajipan defendan di bawah PUS dan untuk menyempurnakan kesemua dokumen dalam jualan masa hadapan di bawah projek pembangunan tersebut. Menentang perintah tersebut, defendan merayu ke mahkamah ini.

**Diputuskan**, menolak rayuan dengan kos:

(1) Defendan tidak boleh menolak untuk mematuhi peruntukan PUS yang telah dipersetujui oleh pihak-pihak dan yang mana defendan telah menerima faedah-faedah daripadanya. Oleh itu defendan, diestop daripada menolak beban yang dikenakan ke atasnya (lihat perenggan 27).

(2) Pembeli bona fide yang telah menandatangani perjanjian jual beli tersebut tidak boleh menanggung kesusahan dan kesulitan memandangkan mereka perlu mendapatkan pembiayaan daripada bank-bank atau institusi-institusi kewangan, dan akhirnya mengambil milikan kosong daripada plaintif (lihat perenggan 29).

(3) Sebagai pemaju, plaintif perlu meneruskan projek pembangunan tersebut dengan teliti dalam jangka masa yang ditetapkan dalam perjanjian jual beli, kerana setelah disempurnakan, tempoh masa tersebut amatlah penting bagi pemaju. Keengganan defendan untuk memenuhi tanggungjawabnya di bawah PUS telah merosakkan reputasi plaintif sebagai pemaju perumahan berlesen, yang akan menjejaskan pembaharuan lesen pemaju atau boleh menghentikan keseluruhan projek pembangunan tersebut (lihat perenggan 30–31).

(4) Memandangkan tindakan defendan secara jelas menyebabkan kesusahan dan kesulitan bukan sahaja kepada plaintif tetapi juga kepada pembeli-pembeli plaintif, mahkamah akan mencelah dan membenarkan injunksi interlokutori walaupun ia merupakan satu ciri mandatori (lihat perenggan 34).

(5) Jelas bahawa tidak adil dan saksama sekiranya defendan yang menikmati faedah-faedah di bawah PUS, dan masih enggan untuk mematuhi kewajipannya untuk menyempurnakan dokumen pindah

milik, oleh itu menafikan kepentingan dan hak-hak plaintif dan pembeli-pembeli plaintif yang memerlukan perlindungan segera melalui injunksi interlokutori mandatori (lihat perenggan 35).]

**Notes**

For cases on interlocutory injunction, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 2860–2862.

For cases on joint venture agreement, see 3(1) *Malall's Digest* (4th Ed, 2006 Reissue) paras 4299–4300.

**Cases referred to**

*Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor* [1989] 2 MLJ 202, HC (refd)

*Bank Islam Malaysia Bhd v Tinta Press Sdn Bhd & Ors* [1986] 1 MLJ 256, HC (refd)

*Bonner v Great Western Railway Company* (1883) 24 Ch 1 (refd)

*Boustead Trading (1985) Sdn Bhd v Arab Malaysia Merchant Bank Bhd* [1995] 3 MLJ 331, FC (refd)

*Canadian Pacific Railway v Gaud* [1949] 2 KB 239 (refd)

*Faber Union Sdn Bhd v Chew Nyat Shong & Anor* [1995] 2 MLJ 597; [1995] 3 CLJ 797, SC (refd)

*Gall v Mitchell* (1924) 35 CLR 222, HC (refd)

*Gibb & Co v Malaysia Building Society Bhd* [1982] 1 MLJ 271; [1982] CLJ (Rep) 99, FC (folld)

*H & R Johnson (Malaysia) Bhd v H & R Johnson Tiles Ltd* [1995] 2 AMR 1390, HC (refd)

*Hoo See Sen & Anor v Public Bank Bhd & Anor* [1988] 2 MLJ 170, SC (refd)

*John Edward Miller & Anor v Jackson & Anor* [1977] QB 966, CA (refd)

*Leisure Data v Bell* [1988] FSR 367 (refd)

*Lim Eh Fah & Ors v Seri Maju Padu* [2002] 7 MLJ 262; [2002] 4 CLJ 37, HC (refd)

*Lim Piak Chai v Bukit Gombak Development Sdn Bhd & Anor* [2003] 4 AMR 46, HC (refd)

*Shepherd v Sandham* [1971] Ch 304 (refd)

*Sivaperuman v Heah Seok Yeong Realty Sdn Bhd* [1979] 1 MLJ 150, FC (refd)

*SJ Securities Sdn Bhd v Esmail bin Naziadin* [1998] 7 MLJ 68; [1999] 1 AMR 1179, HC (refd)

*Strelley v Pearson* (1880) 15 Ch 113 (refd)

*Suntoso Jacob v Kong Miao Ming & Anor* [1984] 2 MLJ 95, HC (distd)

*Tay Tuan Kiat & Anor v Pritam Singh Brar* [1987] 1 MLJ 276, HC (refd)

*Thomas M Heyse & Anor v Boyden World Corp* [1989] 1 MLJ 219, HC (refd)

*Timbermaster Timber Complex (Sabah) Sdn Bhd v Top Origin Sdn Bhd* [2002] 1 MLJ 33, CA (refd)

*Tinta Press Sdn Bhd v Bank Islam Malaysia Bhd* [1987] 2 MLJ 192, SC (refd)

*Von Joel v Hornsey* [1895] 2 Ch 774 (refd)

A *Wah Loong (Jelapang) Tin Mine Sdn Bhd v Chia Ngen Yiok* [1975] 2 MLJ 109, HC (refd)

**Legislation referred to**

Housing Development (Control and Licensing) Act 1966, Schedule G

B Merchant Shipping Act (Cap 172) [SG]

**Appeal from**: Civil Action No M3–22–212 of 2007 (High Court, Ipoh)

*Robert Lazar (Gananathan Loh) for the appellant.*

C *Leong Sai Wah (CK Leong & Co) for the respondent.*

**Low Hop Bing JCA (delivering judgement of the court):**

APPEAL

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**[1]** On 31 July 2008, in the Ipoh High Court, the respondent ('the plaintiff') obtained an interlocutory mandatory injunction against the appellant ('the defendant') (receivers and managers ('R & M') appointed) in the following terms:

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(1) within seven days from the date thereof, to execute 15 memoranda of transfer ('the 15 MOT') (the particulars of which are contained in encl 5 therein);

F (2) to fulfil the defendant's obligations under the joint venture agreement dated 4 May 1996 ('the JVA') entered into between the defendant, the plaintiff, U-Meng Corporation Sdn Bhd and U-Meng Holdings Sdn Bhd (collectively 'U-Meng'), and to execute all documents in future sales under the development project and to return the same to the plaintiff within seven days of notification of sales; and

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(3) to perform smoothly and proceed with the execution of the above orders.

**[2]** This is the defendant's appeal against the interlocutory mandatory

H injunction.

FACTUAL BACKGROUND

**[3]** The plaintiff does not dispute the appointment of the R & M for Foong

I Seong Equipment Sdn Bhd ('Foong Seong').

**[4]** Pursuant to the JVA, on a joint venture basis, the plaintiff was to develop several pieces of land with an aggregate area of 181.516 acres owned respectively by the defendant and U-Meng (collectively 'the land'). A

**[5]** The defendant does not dispute the terms and conditions of the JVA, pursuant to which: B

(1) the plaintiff as developer has agreed to bear the entire costs of development;

(2) the plaintiff has paid a sum of RM3m as security deposit to the respective land owners viz the defendant and U-Meng; C

(3) the plaintiff had also made payment of premium for the land;

(4) the plaintiff was not allowed to create any charge on the land and had to rely on its own financing; D

(5) the JVA was for mutual benefit; and

(6) time shall be of the essence.

**[6]** Between May and September 2003, the defendant received from the plaintiff further advances amounting to RM2,421,681.63. E

**[7]** In 2004, pursuant to a petition presented in the Ipoh High Court by certain shareholders of Foong Seong, the R & M were appointed to manage the affairs of Foong Seong. The High Court also ordered the production of statements of account and payments of entitlement by the plaintiff in respect of the development project outside the Housing Development (Control and Licensing) Act 1966 ('the 1966 Act'). F

**[8]** Upon the defendant seeking clarification on the defendant's entitlement under the 1966 Act, the High Court confirmed that such entitlement would only be due upon completion of the development project and the release of monies from the housing development account under the same Act. G

**[9]** Pursuant to the High Court order, the plaintiff produced the statements of account and informed the defendant that in relation to the defendant's current entitlement, there was an overpayment of RM1m by virtue of the advances given by the plaintiff to the defendant. Vide letter dated 7 June 2007, the plaintiff had duly informed the defendant of the same which the defendant had not denied. H I

**[10]** The defendant had also not denied the plaintiff's payment of the defendant's entitlement in relation to 15 commercial lots.

**[11]** After the confirmation by the High Court that the defendant's entitlement would only be due upon completion of the development project and the release of monies from the account under the 1966 Act, and the plaintiff's notice pertaining to the overpayment, the defendant had refused to execute transfer documents in relation to the sale of the houses developed by the plaintiff under the JVA.

**[12]** By way of illustration, and notwithstanding the demand by the individual purchasers' solicitors, the defendant had refused to execute and return the 15 MOT (for the 15 commercial lots) to effect the registration of the transfer of titles to the purchasers, as a result of which the purchasers could not obtain loans from their banks or financial institutions.

**[13]** More specifically, one Ibiza, the purchaser of Lot No 112 in the development project, has taken action to terminate the purchase of the property.

**[14]** The defendant has also refused to execute new sale and purchase agreements, unless the individual purchasers execute a 'Letter of Acknowledgment' (LOA), purportedly to ensure that the purchasers would not hold the R & M liable under any circumstance, although the LOA is not a requirement under the JVA or the statutory sale and purchase agreement prescribed in Schedule G to the 1966 Act.

**[15]** As a result, the plaintiff was unable to receive a total sum of RM2,714,575 being the proceeds of sale from the houses developed by the plaintiff pursuant to the JVA.

**[16]** Having no other alternative, the plaintiff commenced an action in the High Court, and obtained the interlocutory mandatory injunction.

INTERLOCUTORY MANDATORY INJUNCTION

**[17]** In *Gibb & Co v Malaysia Building Society Bhd* [1982] 1 MLJ 271; [1982] CLJ (Rep) 99, Malaysia Building Society Bhd (MBSB), a company providing finance for housing development, had approved the developer's application for end-finance amounting to RM1,457,100 to develop 85 units of a housing project. Individual purchasers of several units have applied to MBSB for loans. Gibb & Co acted as solicitors for all the parties viz MBSB, the developer and the purchasers. MBSB paid the amount due to the chargee of the land to enable the separate titles to be issued to the purchasers to be free from encumbrance. On obtaining the issue documents of title for the 85 units and other relevant documents, MBSB handed them to Gibb & Co for the requisite documentation. At this stage, a dispute developed between Gibb

& Co and the developers who appointed new solicitors to act for them, and also between the purchasers and the developer. The purchasers alleged that the developer had collected money for extras from them and as a result, the price of the units had been increased. Gibb & Co had caused the transfers in favour of the purchasers to be registered but, in spite of repeated requests by MBSB, failed to register the charges in favour of MBSB in respect of 82 units. MBSB appointed other solicitors to protect its interests. MBSB then lodged caveats against the land and issued a writ to claim declarations that it was entitled to custody of the documents of title and instruments of charge and an order for Gibb & Co to deliver the documents to MBSB. MBSB then applied for an interlocutory mandatory injunction to compel Gibb & Co to forthwith deliver to it the issue documents of title and the instruments of charge. The High Court granted the interlocutory mandatory injunction which was affirmed by the Federal Court on appeal. The Federal Court, speaking through Eusoffe Abdoolcader J (later SCJ) enunciated the relevant principles governing the grant or refusal of an interlocutory mandatory injunction. These principles may be extracted as follows:

(1) An interlocutory application for a mandatory injunction is a very exceptional form of relief: *Canadian Pacific Railway v Gaud* [1949] 2 KB 239 at p 249;

(2) There is no reason why interlocutory or indeed interim mandatory injunctions should not issue in proper and appropriate cases and the court has jurisdiction to so order: *Bonner v Great Western Railway Company* (1883) 24 Ch 1 at p 10;

(3) The applicant's case must be 'unusually sharp and clear', and the court must feel a high degree of assurance that at the trial a similar injunction would probably be granted; the questions of degree would depend, inter alia, upon considerations of hardship and inconvenience to the parties: *Shepherd v Sandham* [1971] Ch 304;

(4) In addition, courts of equity will take into account other relevant considerations which may arise eg:

   (a) how the interests of the parties may best be protected;

   (b) ease or difficulty with which a mandatory order and the extent of hardship which compliance will cause to the respondent; and

   (c) the nature of the injury which will be caused to the applicant if he does not obtain protection at once: *Strelley v Pearson* (1880) 15 Ch 113 at p 117;

(5) The stronger the applicant's case that the matters complained of are unlawful, the more likely it is that it will be just and equitable that his interest will be protected by the immediate issue of an injunction:

*Bonner* (see also *Bank Islam Malaysia Bhd v Tinta Press Sdn Bhd & Ors* [1986] 1 MLJ 256; *Sivaperuman v Heah Seok Yeong Realty Sdn Bhd* [1979] 1 MLJ 150; *Tay Tuan Kiat & Anor v Pritam Singh Brar* [1987] 1 MLJ 276; *Thomas M Heyse & Anor v Boyden World Corp* [1989] 1 MLJ 219; *Tinta Press Sdn Bhd v Bank Islam Malaysia Bhd* [1987] 2 MLJ 192; *Wah Loong (Jelapang) Tin Mine Sdn Bhd v Chia Ngen Yiok* [1975] 2 MLJ 109; *Leisure Data v Bell* [1988] FSR 367, *H & R Johnson (Malaysia) Bhd v H & R Johnson Tiles Ltd* [1995] 2 AMR 1390; *Von Joel v Hornsey* [1895] 2 Ch 774; *SJ Securities Sdn Bhd v Esmail bin Naziadin* [1998] 7 MLJ 68; [1999] 1 AMR 1179 (HC); *Lim Piak Chai v Bukit Gombak Development Sdn Bhd & Anor* [2003] 4 AMR 46 at p 48 (HC); *Timbermaster Timber Complex (Sabah) Sdn Bhd v Top Origin Sdn Bhd* [2002] 1 MLJ 33; and *Malaysia High Court Practice* 2006 Desk Ed Vol 1 p 397 para 29.1.3).

**[18]** With particular reference to the factual background as unfolded in the instant appeal, the elements of hardship and inconvenience to the plaintiff deserve careful consideration.

HARDSHIP AND INCONVENIENCE

**[19]** In objecting to the grant of the interlocutory mandatory injunction, Mr Robert Lazar, learned counsel for the defendant, doubted whether hardship and inconvenience had been caused to the plaintiff and the purchasers. He contended that the respective sale and purchase agreements ('the SPAs') had been executed by the defendant's directors after the R & M were appointed, in which case, the court should not condone the wrongdoing of the directors. He referred to *Suntoso Jacob v Kong Miao Ming & Anor* [1984] 2 MLJ 95 at p 97 (HC), Singapore.

**[20]** Plaintiff's learned counsel Mr Leong Sai Wah submitted that the execution of the SPAs by the defendant's directors had been accepted by the plaintiff in good faith and that the defendant's refusal to execute the transfer documents clearly constitutes a breach of the defendant's obligations under the JVA, in particular cl 17(1)(a), thereby causing hardship and inconvenience to the plaintiff and the plaintiff's bona fide purchasers under the SPAs. The plaintiff relied on:

(1) *John Edward Miller & Anor v Jackson & Anor* [1977] QB 966 (CA);

(2) *Gall v Mitchell* (1924) 35 CLR 222 (HC of Australia);

(3) *The Principles of Equitable Remedies* by ICF Fry, 1984 pp 435, 454 and 455.

**[21]** On the basis of the above submissions, I identify the question for determination as follows:

> given the factual background as unfolded above, and upon a true construction of the JVA and the SPAs, has the plaintiff established an unusually sharp and clear case of hardship and inconvenience to warrant the grant of the interlocutory mandatory injunction?

**[22]** In my view, the execution of the SPAs by the directors of the defendant, after the R & M had been appointed, must be seen in the context of the parties' dealings in general and the JVA in particular. Be it noted that at all material times, the plaintiff has delivered the relevant SPAs to the defendant for execution and there had never been any question raised in relation to the execution thereof by the directors of the defendant. The plaintiff is clearly entitled to have the SPAs duly executed pursuant to cl 17.1(a) of the JVA which, where relevant, reads as follows:

(17) COVENANTS BY THE LANDOWNERS

(17.1(a)) sign execute and deliver the Sale and Purchase Agreements and Memoranda of Transfer to be created in respect of the separate and individual titles and also the applications for consent of the Menteri Besar of Perak, if so required.

**[23]** Under cl 17.1(a), it is the contractual obligation of the defendant to execute not only the SPAs but also the memoranda of transfer. The defendant's contractual rights and obligations under the JVA would upon the appointment of the R & M continue as the R & M are the successors-in-title. That is expressly agreed in cl 36.1(c) which defines the parties to the JVA in the following words:

36.1(c) 'Developer', 'U-Meng Corporation', 'U-Meng Holding' and 'Foong Seong Equipment' include their respective successors-in-title …'.

**[24]** Upon a true construction of cl 36.1(c), which is the 'successor clause', it is clear that the acts of the defendant including the execution of the SPAs by the directors of the defendant are binding on the R & M as the successors-in-title.

**[25]** In the instant appeal, I am unable to find any wrongdoing on the part of the plaintiff when SPAs were executed by the defendant's directors.

**[26]** In *Suntoso Jacob*, on which the defendant relied, the plaintiff had sought a declaration that the first defendant was holding 92,000 shares of $1 nominal value each in the second defendant company, upon trust for him and

for an order that these shares be transferred to him. The company had a paid-up capital of 200,000 shares. If the plaintiff succeeded, he would altogether own 190,000 shares in the company and would be its controller. In 1980, the plaintiff bought a tug from Japan and instructed the first defendant to register it under the Singapore flag in the name of the company. At the material time, the Registrar of Singapore Ships had issued an administrative guideline announcing the policy that vessels such as the tug could not be accepted for registration under the (Singapore) Merchant Shipping Act unless the corporate owner was itself owned as to at least one-half of its equity by Singapore citizens. The plaintiff was aware of this requirement and admitted that the true ownership of the shares had to be kept away from the Registrar of Singapore Ships in order to obtain registration. Lai Kew Chai J (as he then was) of the Singapore High Court dismissed the plaintiff's claim on grounds of false representation and deception, as no court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. I am of the view that the factual matrix in *Suntoso Jacob*, is readily distinguishable. No question of injunction arose there. It is of no assistance to the defendant.

**[27]** Reverting to the mainstream of the instant appeal, the defendant cannot refuse to comply with the provisions of the JVA which the parties had voluntarily entered into and pursuant to which the defendant has received benefits. The defendant is estopped from repudiating the burden imposed on it: *Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd and Anor* [1989] 2 MLJ 202, per Edgar Joseph Jr J (later FCJ).

**[28]** The application of the doctrine of estoppel was further enunciated by the Federal Court in *Boustead Trading (1985) Sdn Bhd v Arab Malaysia Merchant Bank Bhd* [1995] 3 MLJ 331 in the following passage:

> The doctrine of estoppel is a flexible principle by which justice is done according to the circumstances. It is a doctrine of wide utility and has been resorted to in varying fact patterns to achieve justice. The maxim estoppel may be used as a shield but not a sword does not limit the doctrine of estoppel to defendants alone. Plaintiffs too may have recourse to it. Estoppel may assist a plaintiff in enforcing a cause of action by preventing a defendant from denying the existence of some fact which would destroy the cause of action.

**[29]** The bona fide purchasers who have signed the SPAs must not be made to suffer undue hardship and inconvenience as they had to obtain financing from their banks or financial institutions, and ultimately take vacant possession from the plaintiff.

**[30]** As developer, the plaintiff is required to diligently proceed to complete the development project within the time specified in the SPAs, because upon

the execution thereof, time effectively started to run against the developer: *Hoo See Sen & Anor v Public Bank Bhd & Anor* [1988] 2 MLJ 170 (SC); *Faber Union Sdn Bhd v Chew Nyat Shong & Anor* [1995] 2 MLJ 597; [1995] 3 CLJ 797 (SC); and *Lim Eh Fah & Ors v Seri Maju Padu* [2002] 4 CLJ 37 (HC).

**[31]** The defendant's refusal to fulfil the obligations under the JVA has adversely damaged the plaintiff's reputation as a licensed housing developer, which could affect the renewal of the developer's licence or even halt the entire development project.

**[32]** In relation to enforcement of contractual rights, the courts have taken a more serious view of the default by the defendant in a contract such as the JVA which the defendant had voluntarily accepted and assumed the responsibility. The appointment of the R & M does not affect the rights and obligations of the parties to the JVA in view of the successor clause contained in *cl 36.1(c)*.

**[33]** Illustrations of the hardship and inconvenience caused by the defendant to the plaintiff and the plaintiff's purchasers include:

(1) The plaintiff's inability to receive progress payments under the SPAs from the purchasers' banks or financial institutions, thereby forcing the plaintiff to slow down the development of the project under the JVA;

(2) The plaintiff had spent astronomical sums by way of development costs which include the costs of procuring plans, approval and licenses, Environment Impact Assessment (EIA) report, layout and building plains, soil tests, land survey, amalgamation and subdivision of titles, infrastructures, etc; and

(3) The plaintiff's inability to give individual titles to the plaintiff's purchasers, even after advancing the premium for the land and obtaining sub-divided titles at the plaintiff's own costs, as the 15 MOT and the sub-divided titles had been deposited with the defendant.

**[34]** As the defendant's conduct had clearly caused hardship and inconvenience not only to the plaintiff but also the plaintiff's purchasers, the courts will intervene and allow an interlocutory injunction even when it is one of a mandatory nature: *The Principles of Equitable Remedies* at pp 435, 454 and 455, *Miller v Jackson* (CA) per Cumming-Bruce LJ and *Gall v Mitchell*, (HC of Australia).

**[35]** It is clearly inequitable and unconscionable for the defendant to have enjoyed the benefits under the JVA, and yet refused to comply with the obligations to execute the transfer documents, thereby denying the plaintiff

and the plaintiff's purchasers of their corresponding the rights and interests which therefore require immediate protection by way of an interlocutory mandatory injunction.

CONCLUSION

**[36]** On the foregoing grounds, I hold that the plaintiff has established an unusually sharp and clear case of hardship and inconvenience and has satisfied the principles set out by the Federal Court in *Gibb & Co*. There is no appealable error on the part of the learned judicial commissioner in granting the interlocutory mandatory injunction against the defendant. The answer to the above question is in the affirmative. The defendant's appeal, being devoid of merits, is dismissed with costs. The interlocutory mandatory injunction is hereby affirmed. Deposit to the plaintiff on account of taxed costs.

**[37]** My learned colleagues, Raus bin Sharif and Abu Samah bin Nordin, JJCA have read this judgment in draft and have expressed their agreement with it to become the judgment of the court.

*Appeal dismissed with costs.*

Reported by Ashgar Ali Ali Mohamed